

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-4070

Appeal MA18-87

City of Richmond Hill

June 21, 2021

Summary: The Corporation of the City of Richmond Hill (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to two specific residential properties. The city issued a decision granting partial access to the responsive records with severances under the mandatory and discretionary personal privacy exemptions in sections 14(1) and 38(b), as well as section 38(a) (discretion to refuse access to requester's own personal information) in conjunction with section 8(1) (law enforcement) of the *Act*. In this order, the adjudicator upholds the city's decision to withhold personal information under sections 14(1) and 38(b). She partially upholds the city's decision to withhold information under section 38(a), in conjunction with section 8(1), and orders the city to disclose additional information to the appellant. She also upholds the city's search for responsive records as reasonable.

Statutes Considered: The *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of "personal information"), 8(1)(b) and (d), 14(2)(e) and (h), 14(3)(b), 17, 38(a), and 38(b).

OVERVIEW:

[1] This order addresses the issue of access to records relating to a by-law investigation. The Corporation of the City of Richmond Hill¹ (the city) received a request

¹ The Town of Richmond Hill at the time of the request.

under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records related to two specific residential properties.

[2] The city issued a decision granting partial access to the responsive records. The city withheld some records and portions of records under sections 52(2.1) (ongoing prosecution), 38(a) (discretion to refuse requester's own information) in conjunction with sections 8(1)(b) (law enforcement investigation) and 8(1)(d) (confidential source of information), and 38(b) (personal privacy) of the *Act*.

[3] The requester, now the appellant, appealed the city's decision to the Information and Privacy Commissioner of Ontario (IPC) and a mediator was appointed to explore resolution of the issues.

[4] During mediation, the appellant took the position that additional responsive records exist.

[5] Subsequently, the city issued three revised decisions resulting in the disclosure of additional records. One of these revised decisions was issued, because the appellant was able to secure consent from two affected parties to disclose their information to him. The city withdrew its section 52(2.1) claim, and clarified that it was claiming the discretionary personal privacy exemption at section 38(b) and the mandatory personal privacy exemption at section 14(1).

[6] The city conducted further searches for responsive records, and advised that no additional responsive records had been located. The appellant advised he was not satisfied with the city's access decision or its search efforts.

[7] As a mediated resolution was not possible, the appeal was transferred to the adjudication stage, where an adjudicator may conduct an inquiry under the *Act*. I commenced an inquiry by inviting representations from the city, initially. I received and shared the city's representations with the appellant inviting his representations in response. The appellant declined to submit representations.

[8] In this order, I uphold the city's access decision in part. I uphold the city's decision to withhold personal information in the records under sections 14(1) and 38(b). I partially uphold the city's decision to withhold information under section 38(a), in conjunction with section 8(1)(d), and order the city to release additional information to the appellant. I also uphold the city's search for responsive records as reasonable.

RECORDS:

[9] The information remaining at issue are the withheld portions of records 9-13, 16, 19-21, 23-34, 41-43, 49, 50, 52, 53, 57-59, 62, and 63 noted below, as listed in the city's revised index of records.

Record#	Description	# of	Access	Exemption
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		pages	Granted	Claimed
9	Grading Plan	1	Partial	38(b), 38(a) & 8(1)(b)
10	Field Inspection Report – 2012	1	Partial	38(b), 38(a) & 8(1)(b),(d)
11	Field Inspection Report – 2017	1	Partial	38(b), 38(a) & 8(1)(b),(d)
12	Development Engineering Form – 2017	1	None	38(b) & 38(a) 8(1)(b),(d)
13	Development Engineering Notes	1	None	38(b), 38(a) & 8(1)(b),(d)
16	Letter from Town of Richmond Hill to resident	1	None	38(b)
19	Development Engineering Form – Date unknown	1	None	38(b), 38(a) & 8(1)(b),(d)
20	Engineering Grading Form – 2012	1	Partial	38(b), 38(a) & 8(1)(b),(d)
21	Emails between the Town of Richmond Hill and resident	3	None	38(b), 38(a) & 8(1)(b),(d)
23	Emails between the Town of Richmond Hill and resident	5	None	38(b), 38(a) & 8(1)(b),(d)
24	Emails between the Town of Richmond Hill and resident	1	None	38(b), 38(a) & 8(1)(b),(d)
25	Emails between the Town of Richmond Hill staff	1	None	38(b), 38(a) & 8(1)(b),(d)
26	Emails between the Town of Richmond Hill staff	2	Partial	38(b), 38(a) & 8(1)(b),(d)
27	Emails between the Town of Richmond Hill staff and Member of Council	1	None	38(b), 38(a) & 8(1)(b),(d)
28	Emails between the Town of Richmond Hill staff and Member of Council	2	Partial	38(b), 38(a) & 8(1)(b),(d)

29	Emails between the Town of Richmond Hill staff and Member of Council	2	Partial	38(b), 38(a) & 8(1)(b),(d)
30	Emails between the Town of Richmond Hill staff and Member of Council	1	Partial	38(b), 38(a) & 8(1)(b),(d)
31	Emails between the Town of Richmond Hill and resident	1	None	38(b), 38(a) & 8(1)(b),(d)
32	Emails between the Town of Richmond Hill staff and Member of Council	2	Partial	38(b), 38(a) & 8(1)(b),(d)
33	Emails between the Town of Richmond Hill and resident	1	None	38(b), 38(a) & 8(1)(b),(d)
34	Emails between the Town of Richmond Hill and resident	3	None	38(b), 38(a) & 8(1)(b),(d)
41	Emails between the Town of Richmond Hill staff and Member of Council	1	Partial	38(b), 38(a) & 8(1)(b),(d)
42	Emails between the Town of Richmond Hill staff and Member of Council	2	Partial	38(b), 38(a) & 8(1)(b),(d)
43	Emails between the Town of Richmond Hill staff	1	None	38(b), 38(a) & 8(1)(b),(d)
49	Letter to owner of property	1	None	38(b)
50	Photos – April 16, 2012	9	Partial	38(b), 38(a) & 8(1)(b),(d)
52	Letter to owner of property	1	Partial	38(b)
53	Field Inspection Report	1	Partial	38(b), 38(a) & 8(1)(b),(d)
57	Photos – November 24, 2017	52	Partial	38(a) & 8(1)(b)
58	Photos – November 28, 2017	24	None	38(a) & 8(1)(b)
59	Photos – August 14, 2017	14	Partial	38(a) & 8(1)(b)

62	Photos – November 1, 2017	32	Partial	38(a) & 8(1)(b)
63	Photos – November 21, 2017	4	None	38(a) & 8(1)(b)

ISSUES:

- A. Do the records contain “personal information” as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the mandatory personal privacy exemption at section 14(1) or the discretionary personal privacy exemption at section 38(b) apply to the information at issue?
- C. Does the discretionary exemption at section 38(a) (discretion to refuse access to requester’s own personal information), in conjunction with the section 8(1) (law enforcement) exemption, apply to the information at issue?
- D. Did the city exercise its discretion under sections 8(1)(d), 38(a), and 38(b)? If so, should the exercise of discretion be upheld?
- E. Did the city conduct a reasonable search for responsive records?

DISCUSSION:

A. Do the records contain “personal information” as defined in section 2(1) and, if so, to whom does it relate?

[10] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain “personal information” and, if so, to whom it relates. That term is defined in section 2(1). The relevant portions are as follows:

“personal information” means recorded information about an identifiable individual, including,

- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to

that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[11] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.²

[12] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.³

[13] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.⁴

[14] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁵

Representations

[15] As noted above, the appellant did not submit representations.

[16] The city submits that the records at issue contain personal information as defined by section 2(1) of the *Act*. However, the city does not specify what types of personal information the records contain or which paragraphs of the definition in section 2(1) the information may fit within.

Analysis and findings

[17] After reviewing the records at issue and the representations of the city, I find that records 9-13, 20, 21, 23-34, 41-43, and 53 contain the personal information of the appellant combined with that of the other identifiable individuals. Specifically, I find that

² Order 11.

³ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁴ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁵ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

the records contain information such as their email address, address, phone number, their personal views and opinions, their private correspondence and replies to that correspondence, views or opinions about them, and their name along with other information, which fits within paragraphs (c)-(h) of the definition of "personal information" in section 2(1) of the *Act*.

[18] I also find that records 16, 19, 49, and 52 contain only the personal information of identifiable individuals other than the appellant. These records contain information about the individuals, such as their address, phone number, their personal views and opinions, and their name along with other information, which fits within paragraphs (d), (e), and (h) of the definition of "personal information" in section 2(1) of the *Act*.

[19] The city claims that records 50, 58, 59, and 63 contain personal information as that term is defined under the *Act*. Record 50 contains photographs of landscaping on a property. The second last photo includes a partial image of legs clad in blue jeans, but the person cannot be identified from the photograph. Records 58, 59, and 63 contain photographs of landscaping at different houses. Based on my review of these photographs, I find that they do not contain "personal information" as defined by section 2(1) of the *Act*, because they are not recorded information about identifiable individuals, consisting instead of photographs of property. However, the city also claims that section 38(a), in conjunction with section 8(1), applies to these records, so I will review these records under those exemptions below.

[20] While the city did not claim the mandatory or discretionary personal privacy exemption over records 57 and 62, the city redacted licence plate numbers in two photographs contained in record 57, as well as a person in a photograph in record 62. Based on my review of these records, I find that the withheld portions of these photographs in records 57 and 62 contain the personal information of identifiable individuals. Previous IPC orders have found that licence plate numbers qualify as "personal information", because they are considered an "identifying number" as contemplated by paragraph (c) of the definition of "personal information" in section 2(1) of the *Act*.⁶ With respect to the person in the photograph at record 62, this appeal deals with a by-law investigation into water drainage of multiple related properties. Given the specific location the person appears in and the distinct nature of their clothing, I find that it is reasonable to expect that the individual would be identified, if the photograph were released.

[21] The IPC applies the "record-by-record" method of analysis to records subject to an access-to-information request. Where the information at issue is the withheld portion of a record that has been partially released, the whole of the record (including released portions) is analyzed in determining a requester's right to access the withheld

⁶ Orders MO-1863, MO-1917, and MO-3902.

information.⁷ Since I found records 9-13, 20, 21, 23-34, 41-43, and 53 contain the personal information of the appellant combined with that of the other identifiable individuals, I must review the application of the discretionary personal privacy exemption in section 38(b) of the *Act*. However, the only personal information in records 16, 19, 49, 52, 57, and 62 belongs to other identifiable individuals and, therefore, the relevant personal privacy exemption is the mandatory one in section 14(1).

B. Does the mandatory personal privacy exemption at section 14(1) or the discretionary personal privacy exemption at section 38(b) apply to the information at issue?

[22] Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

[23] Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an “unjustified invasion” of the other individual’s personal privacy, the institution may refuse to disclose that information to the requester. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.⁸

[24] In contrast, under section 14(1), where a record contains personal information of another individual but *not* the requester, the institution is prohibited from disclosing that information unless one of the exceptions in paragraphs (a) to (e) applies, or unless the section 14(1)(f) exception applies.

[25] In applying either the section 38(b) exemption or the section 14(1)(f) exception to the section 14(1) exemption, sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of personal privacy. Also, section 14(4) lists situations that would not be an unjustified invasion of personal privacy.

[26] If the records are not covered by a presumption in section 14(3), section 14(2) lists various factors that may be relevant in determining whether disclosure of the personal information would be an unjustified invasion of personal privacy, and the information will be exempt unless the circumstances favour disclosure.⁹

[27] For records claimed to be exempt under section 38(b) (i.e. records that contain

⁷ See Orders M-352 and PO-3642.

⁸ See below in the “Exercise of Discretion” section for a more detailed discussion of the institution’s discretion under section 38(b).

⁹ Order P-239.

the requester's personal information), the IPC will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.¹⁰

Representations, analysis and findings

[28] As noted above, I must review the application of the discretionary personal privacy exemption in section 38(b) to records 9-13, 20, 21, 23-34, 41-43, and 53, and the mandatory personal privacy exemption in section 14(1) to records 16, 19, 49, 52, 57, and 62.

[29] The city submits that none of the paragraphs in 14(1)(a) to 14(1)(e) apply to the withheld information. The city further submits that section 14(4) does not apply. Based on my review of the withheld information and the representations of the city, I find that none of the exceptions at sections (a) to (e) of 14(1) and 14(4) apply. Since I have found that none of the exceptions at sections 14(1)(a) to (e) or 14(4) apply, I must consider any section 14(3) presumptions or section 14(2) factors that may apply.

Section 14(3)(b) presumption

[30] The city submits that the section 14(3)(b) presumption applies to the personal information at issue, because all of the records relate to investigations into a possible violation of law, specifically violations of city by-laws. The city submits, therefore, that disclosure of the withheld personal information is presumed to constitute an unjustified invasion of personal privacy to whom the information relates.

[31] Section 14(3)(b) states:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation

[32] Based on my review of the records, I find that section 14(3)(b) applies to all the personal information at issue in this appeal. I am satisfied that the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, specifically a by-law investigation. Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.¹¹ Previous

¹⁰ Order MO-2954.

¹¹ Orders P-242 and MO-2235.

IPC orders have found that the presumption can apply to a variety of investigations, including those relating to by-law enforcement, as is the case in this appeal.¹²

[33] Since records 16, 19, 49, 52, 57, and 62 do not contain the appellant's personal information, the relevant personal privacy exemption is the mandatory one in section 14(1). After reviewing the representations of the city and the records at issue, I find that the withheld personal information in records 16, 19, 49, 52, 57, and 62 is exempt under the mandatory personal privacy exemption at section 14(1).

[34] As noted above, in reviewing the mandatory exemption in section 14(1), once a section 14(3) presumption has been established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies. I have found that the section 14(3)(b) presumption applies to the withheld personal information in records 16, 19, 49, 52, 57, and 62, and that none of the exceptions in section 14(4) apply. The parties also did not argue that the "public interest override" at section 16 applies to the information at issue, and I am satisfied that it does not. Therefore, I find that section 14(1) applies to exempt from disclosure the withheld personal information in records 16, 19, 49, 52, 57, and 62.

Section 14(2) factors

[35] For records 9-13, 20, 21, 23-34, 41-43, and 53, which I must review under the section 38(b) discretionary personal privacy exemption, the presumption in section 14(3)(b) must be weighed and balanced with any factors in section 14(2) that are relevant.

[36] The city submits that the factors in section 14(2)(e) (pecuniary or other harm) and 14(2)(h) (supplied in confidence) apply to the withheld information. These factors weigh against disclosure, if they are found to apply.

[37] As noted, the appellant did not submit any representations. However, the appellant did submit a letter (addressed to the city) with his appeal, which outlines the reasons why he wants access to the withheld information. His reasons do not address any factors favouring disclosure in section 14(2)(a) to 14(2)(d) specifically, and I find that none apply in the circumstances of this appeal. However, as I noted above, the list is not exhaustive and other relevant circumstances must be considered. I have considered the appellant's reasons and address them below.

[38] Sections 14(2)(e) and (h) state:

¹² Orders MO-2147, MO-3712, and MO-2954.

14(2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

(e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;

(h) the personal information has been supplied by the individual to whom the information relates in confidence

[39] In order for section 14(2)(e) to apply, the evidence must demonstrate that the damage or harm envisioned by the clause is present or foreseeable, and that this damage or harm would be "unfair" to the individual involved.¹³ While the city argues that section 14(2)(e) applies to the personal information at issue in this appeal, the city does not identify what that damage or harm is or explain why it is foreseeable. The city was required to provide evidence to demonstrate that disclosure of the withheld personal information would result in exposure of the individuals to whom the information relates to unfair pecuniary or other harm. Since the city has provided insufficient evidence to demonstrate that, and I see no basis to support it in the records, I find that section 14(2)(e) does not apply in this appeal.

[40] Section 14(2)(h) applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.¹⁴

[41] The city submits that the individuals supplied the personal information in the records explicitly in confidence as part of the by-law investigation. Even if this is correct, the city has provided no other explanation or evidence to support this statement. In the circumstances, I do not have sufficient evidence to find that this factor applies to weigh against disclosure.

Unlisted factors

[42] I have considered the appellant's reasons for seeking access to the withheld personal information to determine if they support the application of any unlisted factors that would weigh in favour of disclosure.

[43] The appellant's letter to the city outlines the history of his ongoing issues with the city with respect to the drainage of water on his and other related properties. The appellant explains that he has had to complete many alterations to his property, but has not received any written confirmation of the final inspections and approvals. The

¹³ Order P-256.

¹⁴ Order PO-1670.

appellant explains that he is requesting the records, because he believes these particular inspection and approval documents will be part of the records at issue in this appeal. I have considered that the appellant's submissions regarding his concerns with the city's by-law investigation may raise inherent fairness issues, which is an unlisted factor that has been found to weigh in favour of disclosure.¹⁵ Under this factor, individuals whose rights may be affected by the decision making of an institution may be entitled to greater (or "adequate") disclosure about the case against them as a matter of procedural fairness.

[44] While it is apparent that the appellant is frustrated with the many alterations he has had to complete on his property and would like the drainage issue with the city resolved, I am not persuaded that disclosure of the withheld personal information could reasonably be expected to assist him with that goal. As noted above, the withheld personal information includes the phone numbers, email addresses, names, and other information about identifiable individuals not associated with the city. I cannot see how disclosure of this particular personal information is connected to, or would assist the appellant in, resolving his issues with the city. Therefore, I find that the appellant's reasons for requesting the records do not support, or establish, the unlisted factor for inherent fairness weighing in favour of disclosure of the withheld personal information in the circumstances of this appeal.

Conclusion

[45] In considering the application of section 38(b) to the personal information withheld on that basis, I have found that no section 14(2) factors weigh in favour of or against disclosure. I have also found that the section 14(3)(b) presumption applies to the withheld personal information. Balancing the interests of the parties, the facts of this appeal weigh against disclosure of the withheld personal information in the records. Therefore, I find that the withheld personal information in records 9-13, 20, 21, 23-34, 41-43, and 53 is exempt from disclosure pursuant to the discretionary exemption at section 38(b) of the *Act*, subject to my finding on the city's exercise of discretion below.

C. Does the discretionary exemption at section 38(a) (discretion to refuse access to requester's own personal information), in conjunction with the section 8(1) (law enforcement) exemption, apply to the information at issue?

[46] Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

[47] The city has claimed section 38(a), which reads:

¹⁵ Orders M-82, PO-1731, PO-1750, PO-1767 and P-1014.

A head may refuse to disclose to the individual to whom the information relates personal information,

if section 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

[48] Section 38(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.¹⁶

[49] Where access is denied under section 38(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be disclosed to the requester because the record contains his or her personal information.

[50] In this case, the city relies on section 38(a) in conjunction with sections 8(1)(b) and 8(1)(d). For records 50, 58, 59, and 63, however, which do not contain any personal information, I will only review the application of sections 8(1)(b) and/or 8(1)(d).

[51] The relevant parts of section 8(1) state:

(1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,

(b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

(d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;

[52] The term "law enforcement" is used in several parts of section 8, and is defined in section 2(1) as follows:

"law enforcement" means,

(a) policing,

(b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or

(c) the conduct of proceedings referred to in clause (b)

¹⁶ Order M-352.

[53] The term “law enforcement” has covered the following situations:

- a municipality’s investigation into a possible violation of a municipal by-law.¹⁷
- a police investigation into a possible violation of the *Criminal Code*.¹⁸
- a children’s aid society investigation under the *Child and Family Services Act*.¹⁹
- Fire Marshal fire code inspections under the *Fire Protection and Prevention Act, 1997*.²⁰

[54] The IPC has stated that “law enforcement” does not apply to the following situations:

- an internal investigation by the institution under the *Training Schools Act* where the institution lacked the authority to enforce or regulate compliance with any law.²¹
- a Coroner’s investigation or inquest under the *Coroner’s Act*, which lacked the power to impose sanctions.²²

[55] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.

[56] It is not enough for an institution to take the position that the harms under section 8 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.²³ The institution must provide detailed evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.²⁴

¹⁷ Orders M-16 and MO-1245.

¹⁸ Orders M-202 and PO-2085.

¹⁹ Order MO-1416.

²⁰ Order MO-1337-I.

²¹ Order P-352, upheld on judicial review in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (1993), 102 D.L.R. (4th) 602, reversed on other grounds (1994), 107 D.L.R. (4th) 454 (C.A.).

²² Order P-1117.

²³ Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

²⁴ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

Representations, analysis and findings

[57] Based on my review of the records and the representations of the city, I find that section 38(a), in conjunction with section 8(1)(d), applies to exempt the portions of records 10, 20, and 53 withheld on that basis. I also find that section 8(1)(d) applies to record 50.

[58] I have already found that the personal privacy exemption in section 14(1) or section 38(b) applies to exempt some withheld portions of records 9-11, 20, 26, 28-30, 32, 41, 42, 52, 53, 57, 62, and records 12, 13, 16, 19, 21, 23-25, 27, 31-34, 43, 49, in full. Therefore, I do not need to make a determination on the application of section 38(a), in conjunction with section 8(1), to those records or portions of those records.

Section 8(1)(b) (law enforcement investigation)

[59] The only information left at issue, that the city has claimed section 8(1)(b) applies to, is in the withheld portions of records 10, 20, 50, 53, 57, 59, 62, and records 58 and 63, in full. The city submits that section 8(1)(b) applies to the withheld information, because its disclosure could reasonably be expected to interfere with an ongoing law enforcement investigation.

[60] In order for section 8(1)(b) to apply, the law enforcement investigation in question must be a specific, ongoing investigation. The exemption does not apply where the investigation is completed, or where the alleged interference is with "potential" law enforcement investigations.²⁵ The investigation in question must be ongoing or in existence.²⁶

[61] I accept the city's submission that there is an ongoing law enforcement investigation, specifically a by-law investigation into water drainage on multiple properties. However, I am not persuaded by the city's statement that disclosure of the withheld information could reasonably be expected to interfere with that ongoing by-law investigation. The city does not provide any details or explanation to support its argument. Records 10 and 53 are the same redacted Field Inspection Report, and record 20 is the handwritten version of these records. Records 50, 57-59, 62, and 63 are photographs of landscaping at different houses. The city has not explained how the disclosure of this information could reasonably be expected to interfere with the ongoing investigation.

[62] Establishing the exemptions in section 8 of the *Act* requires that the expectation of one of the enumerated harms coming to pass, should a record be disclosed, not be fanciful, imaginary or contrived, but rather one that is based on reason.²⁷ This

²⁵ Order PO-2085.

²⁶ Order PO-2657.

²⁷ Orders PO-2099 and MO-2986.

requirement means that there must be some logical connection between disclosure of the record and the potential harm that the city seeks to avoid by applying the exemption.²⁸ The city was required to provide detailed evidence about the potential for harm, and demonstrate a risk of harm that is well beyond the merely possible or speculative, although it need not prove that disclosure will in fact result in such harm.²⁹

[63] Based on the evidence before me, I find that the city has not established a reasonable expectation that disclosure of the withheld information would interfere with the ongoing by-law investigation for the purpose of section 8(1)(b). Additionally, from my review of the withheld information, it is not self-evident how disclosure of the withheld information would interfere with the city's by-law investigation. Given the speculative nature of the city's representations, and the fact that evidence amounting to speculation of possible harm is not sufficient to meet the requirements of section 8(1)(b), I find that section 8(1)(b) does not apply to the withheld information in records 10, 20, 50, 53, 57-59, 62 and 63.

[64] I will order the city to disclose the withheld photographs in records 57-59, 62, and 63, except for the portions of records 57 and 62 that I have found exempt under the section 14(1) exemption. However, the city also claims that the section 8(1)(d) exemption applies to the same portions of records 10, 20, 50, and 53 as it did for section 8(1)(b). Therefore, I must review the application of section 8(1)(d) to these records.

Section 8(1)(d) (confidential source)

[65] In order for section 8(1)(d) to apply, the city must establish a reasonable expectation that the identity of the source or the information given by the source would remain confidential in the circumstances.³⁰

[66] The city withheld portions of records 10, 20, 50, and 53 under the section 8(1)(d) exemption. The city argues that disclosure of the withheld portions of these records would reveal the identity of a confidential source, or disclose information furnished only by the confidential source. The city submits that the information was supplied in confidence as part of the by-law investigation.

[67] As noted previously, records 10 and 53 are the same redacted Field Inspection Report, and record 20 is the handwritten version of these records. The report is authored by the city inspector who attended the property in response to a by-law complaint. The portions of these records withheld under section 8(1)(d) contain the identity of the complainant and notes made by the inspector, which would reveal

²⁸ Orders 188 and P-948.

²⁹ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

³⁰ Order MO-1416.

information provided by the complainant.

[68] Record 50 consists of photographs of landscaping. The by-law investigation in question relates to water drainage on multiple adjacent properties. Given the content of the photographs and the manner in which the photograph was taken, I am satisfied that disclosure of these photographs could reasonably be expected to reveal the identity of the complainant. Further, I accept that there was a reasonable expectation, in the circumstances, that the identity of the source of the information would remain confidential.

[69] Based on my review of these records, I find that the portions of these records that the city withheld under section 8(1)(d) contain information, which if disclosed, would reveal the identity of, or information provided by a confidential source. Therefore, I find that section 38(a), in conjunction with section 8(1)(d), applies to exempt the portions of records 10, 20, and 53 withheld on that basis, and that section 8(1)(d), alone, applies to record 50, subject to my finding on the city's exercise of discretion below.

D. Did the city exercise its discretion under sections 8(1)(d), 38(a), and 38(b)? If so, should the exercise of discretion be upheld?

[70] The sections 8(1)(d), 38(a), and 38(b) exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[71] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[72] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.³¹ The IPC may not, however, substitute its own discretion for that of the institution.³²

[73] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be

³¹ Order MO-1573.

³² Section 43(2).

relevant:³³

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

Representations, analysis and findings

[74] The city submits that it did not exercise its discretion in bad faith or for an improper purpose, and that it took into account all relevant factors and it did not take into account any irrelevant factors. As noted previously, the appellant did not submit representations.

[75] Based on the city's representations, I find that the city did not err in its exercise of discretion with respect to its decision to deny access to the personal information in records 9-13, 20, 21, 23-34, 41-43, and 53 under section 38(b); the withheld information in records 10, 20, and 53 under section 38(a) in conjunction with section

³³ Orders P-344 and MO-1573.

8(1)(d); and the withheld information in record 50 under section 8(1)(d) of the *Act*.

[76] I am satisfied that the city took into account relevant factors, and did not take into account irrelevant factors in the exercise of its discretion. In particular, I am satisfied that the city considered the fact that the records contain the appellant's own personal information and provided him with access to as much information as possible by applying the exemptions in a limited and specific manner.

E. Did the city conduct a reasonable search for records?

[77] Where a requester claims additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.³⁴ If I am satisfied the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[78] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show it has made a reasonable effort to identify and locate responsive records.³⁵ A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.³⁶

[79] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding such records exist.³⁷

Representations

[80] The city submits that the appellant clarified the request in consultation with the city's Access and Privacy Officer.

[81] The city submits that it conducted a reasonable search for responsive records. In support of its position, the city provided the following affidavit evidence from city staff who were engaged in undertaking the search after receiving a copy of the appellant's request:

- The affidavit of an Development Engineering Technologist, who conducted his own search;

³⁴ Orders P-85, P-221 and PO-1954-I.

³⁵ Orders P-624 and PO-2559.

³⁶ Orders M-909, PO-2469 and PO-2592.

³⁷ Order MO-2246.

- The affidavit of the Acting Supervisor of By-Law and Licensing Enforcement, who conducted his own search; and
- The affidavit of a Grading Technologist, who conducted his own search.

[82] The relevant portions of the affidavit of the Development Engineering Technologist for the city's Planning and Regulatory Services are as follows:

- They have been in their position with the city for three years.
- They conducted a search for responsive records in the "Grading Folder on the T Drive, all email folders in Outlook, the grading complaint archives folders", and "file folders specific to the addresses in the request".
- They provided all responsive records they found to the city's Manager of Information Governance.
- Subsequently, the city's Manager of Information Governance requested that they conduct another search for records responsive to the request, this time with a special focus on photographs.
- They conducted another search in the same locations, focusing on photographs, and found no further records that were responsive to the request.

[83] The relevant portions of the affidavit of the Acting Supervisor of By-Law and Licensing Enforcement for the city's Community Services Department are as follows:

- They have been in their position with the city for three years.
- They conducted a search for responsive records in "By-Law Tracker".
- They did not find any additional records.

[84] The relevant portions of the Grading Technologist's affidavit are as follows:

- They have been in their position with the city for twelve years.
- They conducted a search for responsive records in the "T Drive, Grading Folders, grading complaint folders, and all emails".
- They provided all responsive records they located to the city's Manager of Information Governance.
- Subsequently, the city's Manager of Information Governance requested that they conduct another search for records responsive to the request, this time with a special focus on photographs.
- They conducted another search in the same locations, focusing on photographs, and found no further records that were responsive to the request.

[85] The city submits that the two technologists from the Planning and Regulatory Services Department were directly involved in the case, which is still active and open. The city further submits that the Acting Supervisor of By-Law and Licensing Enforcement for the city's Community Services Department was not directly involved in the case; however, he is the senior staff member who had to conduct the further search, as the original By-law and Licensing Enforcement Officer involved with the case is no longer employed with the city.

[86] As noted previously, the appellant did not submit representations.

Analysis and findings

[87] The review of the issue of whether the institution has conducted a reasonable search for records as required by section 17 arises where a requester claims additional records exist beyond those identified by the institution.³⁸ As noted above, while a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding such records exist. In the absence of representations from the appellant, I am not satisfied there is a reasonable basis for his belief that further responsive records exist.

[88] The city has provided affidavits in support of its search for records responsive to the appellant's request. The city has described the individuals involved in the search, where they searched, and the results of their search. Except for the Acting Supervisor of By-Law and Licensing Enforcement, the other two city staff were directly involved with the case. Therefore, I am satisfied that experienced employees knowledgeable in the subject matter of the request conducted the searches.

[89] The *Act* does not stipulate how a search should be undertaken, or what information should be included in an affidavit. Nor does the *Act* demand perfection. I must only be satisfied that sufficient evidence has been provided to establish that a reasonable search has been conducted. Based on the representations of the city, and in the absence of persuasive evidence to the contrary, I am satisfied that the city's search for responsive records was reasonable.

ORDER:

1. I uphold the city's access decision to withhold the personal information in the records under sections 14(1) and 38(b), and find additional portions of records 57 and 62 exempt under section 14(1) that I have highlighted on the copy of the records provided to the city along with this order.

³⁸ Orders P-85, P-221 and PO-1954-I.

2. I partially uphold the city's access decision to withhold information under section 38(a) in conjunction with section 8(1)(d). However, I do not uphold the city's decision to deny access to some of the withheld portions of records 57-59, 62, and 63.
3. I order the city to disclose to the appellant the non-exempt portions of records 57-59, 62, and 63. I also order the city to disclose to the appellant records 58 and 63, in full. This information is to be disclosed by **July 27, 2021** but not before **July 22, 2021**.
4. In order to verify compliance with order provision 3, I reserve the right to require the city to provide me with a copy of the records disclosed to the appellant.

Original signed by: _____

Anna Truong
Adjudicator

_____ June 21, 2020